

**A Chut Nyak Isham bin Nyak Ariff v Malaysian Technology
Development Corp Sdn Bhd & Ors**

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO
D10(D1)–22–878 OF 2008
MOHAMED APANDI J
6 APRIL 2009

C *Arbitration — Stay of proceedings — Application — Stay pending arbitration —
Whether the Arbitration Act 2005 was law governing agreement — Arbitration
Act 2005 ss 9, 10 & 23*

D On 5 August 2005, the parties to this action had executed three agreements
namely the investment agreement, the shareholders agreement and the option
agreement ('the three agreements'). All the three agreements contained
E arbitration clauses. By way of its letter dated 4 June 2008 the first defendant
had requested for the dispute to be referred to arbitration. This notice to
arbitrate was served on the other parties by registered post on 5 June 2008.
The defendant then applied by way of this application to stay further
proceedings in this action pending reference to arbitration. The defendant's
F application for stay was premised on the fact that the relevant law applicable
for the purposes of the application for stay was the Arbitration Act 2005 ('the
Act'). The plaintiff opposed this application for stay on the grounds that as
the agreement to apply for arbitration was null and void, it fell under one of
the exceptions to s 10 of the Act.

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Held, allowing the application with costs:

- H** (1) The three respective clauses in the three agreements between the parties
are by themselves arbitration agreements within s 9 of the Act. When
the first defendant issued and served the notice to arbitrate on the other
parties to the action on 5 June 2008, he had, under s 23 of the Act
commenced arbitral proceedings. As such the arbitral proceedings were
commenced after the Act came into operation and the Act would form
the law governing the arbitration agreement. Therefore the application
I for stay was made under the provisions of s 10 of the Act (see paras 4,
8 & 11).
- (2) As the word 'shall' in s 10 of the Act is imperative in nature, the court
should be in favour of granting the stay. Not to grant a stay would be

the exception and not the norm. Further, s 10(3) of the Act provides that arbitral proceedings take precedence over any court proceeding (see paras 13 & 15).

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[Bahasa Malaysia summary]

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Pada 5 Ogos 2005, pihak-pihak dalam tindakan ini memeterai tiga perjanjian iaitu perjanjian pelaburan, perjanjian pemegang saham dan perjanjian pilihan ('ketiga-tiga perjanjian'). Ketiga-tiga perjanjian tersebut mengandungi klausa timbang tara. Melalui suratnya yang bertarikh 4 Jun 2008, defendan pertama meminta pertikaian dirujuk kepada timbang tara. Notis untuk timbang tara diserahkan kepada pihak-pihak lain melalui pos berdaftar pada 5 Jun 2008. Defendan kemudian memohon melalui permohonan ini untuk penangguhan prosiding selanjutnya di dalam tindakan ini sehingga rujukan kepada timbang tara. Permohonan defendan untuk penangguhan adalah berasaskan kepada fakta bahawa undang-undang relevan yang beraplikasi untuk tujuan permohonan penangguhan adalah Akta Timbang Tara 2005 ('Akta'). Plaintiff membantah permohonan untuk penangguhan atas alasan bahawa perjanjian untuk memohon timbang tara adalah tidak sah dan batal, ia terangkum di bawah salah satu pengecualian kepada s 10 Akta.

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Diputuskan, membenarkan permohonan dengan kos:

- (1) Ketiga-tiga klausa dalam ketiga-tiga perjanjian antara pihak-pihak adalah dengan sendirinya perjanjian timbang tara di dalam s 9 Akta. Apabila defendan pertama mengeluarkan dan menyerahkan notis untuk timbang tara kepada pihak-pihak lain dalam tindakan ini pada 5 Jun 2008, dia telah memulakan prosiding timbang tara di bawah s 23 Akta tersebut. Oleh itu, prosiding timbang tara telah dimulakan selepas Akta tersebut berkuat kuasa dan Akta tersebut membentuk undang-undang yang mentadbir perjanjian timbang tara. Oleh itu permohonan untuk penangguhan adalah dibuat di bawah s 10 Akta tersebut (lihat perenggan 4, 8 & 11).
- (2) Oleh sebab perkataan 'shall' di dalam s 10 Akta tersebut adalah bersifat wajib, mahkamah sepatutnya membenarkan penangguhan tersebut. Tidak memberikan penangguhan akan menjadi pengecualian dan bukannya norma. Selanjutnya s 10(3) Akta memperuntukkan bahawa prosiding timbang tara diberi keutamaan berbanding mana-mana prosiding mahkamah yang lain (lihat perenggan 13 & 15).]

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Notes

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1488–1527.

A Cases referred to

Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors [2008] 6 MLJ 817, CA (folld)

CMS Energy Sdn Bhd v Poscon Corp [2008] 6 MLJ 561, HC (folld)

B *Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd*
(formerly known as *Loagan Bunut Plantations Sdn Bhd*) [2008] 8 MLJ 471;
[2008] 1 LNS 401, HC (distd)

Innotec Asia Pacific Sdn Bhd v Inotec GmbH [2007] 8 CLJ 304, HC (folld)

Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor
[2008] 1 MLJ 233, HC (folld)

C *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor*
[2008] 3 MLJ 872, HC (folld)

Legislation referred to

Arbitration Act 2005 ss 9, 10, 10(1), (3), 18, 18(3), 23, 51(2)

D *Sara Idylla bt Isbah (Haniff Khatri) for the plaintiff.*
Arief Emran bin Ariffin (Skrine) for the defendant.

Mohamed Apandi J:

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[1] Enclosure 9, is an application by the first defendant by way of a summons in chambers, for further proceedings in this action be stayed pending reference to arbitration.

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[2] The application for stay is made pursuant to the respective arbitration clauses in three agreements (all dated 5 August 2005) between the parties. The three arbitration clauses in the respective agreements were:

- G**
- (a) Clause 16.3 of the investment agreement (see exh 'MTDC 1' of encl 8);
 - (b) Clause 15.2 of the shareholders agreement (see exh 'MTDC 2' of encl 8); and
 - (c) Clause 10.1 of the option agreement (see exh 'MTDC 3' of encl 8).

H THE APPLICABLE LAW IS THE ARBITRATION ACT 2005

[3] From the cause papers filed herein, the following findings are pertinent:

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- (a) Although the three agreements were executed in August 2005, the first defendant issued the notice to arbitrate vide their solicitor's letter dated 4 June 2008 and served the said notice by registered post on the following day, on 5 June 2008.

- (b) By the issuance and serving of the notice to arbitrate (as in exh 'MTDC 4' of encl 8) the first defendant had, in law, commenced the arbitral proceedings on or about 5 June 2008, much after the date when the Arbitration Act 2005 came into force, namely on 15 March 2006. A
- (c) Based on the above premise and applying s 51(2) of the Arbitration Act 2005, the relevant law applicable for purposes of this application for stay is the Arbitration Act 2005. A fortiori, the plaintiff himself has conceded on this matter by acknowledging the applicability of s 10 of the Arbitration Act 2005 (see para 5.6 of the plaintiff's affidavit in reply, encl 11). B

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The plaintiff in opposing this application for stay, claimed that it falls under one of the exceptions of the s 10 of the Arbitration Act, namely that the agreement is null and void.

APPLYING THE LAW TO THE FACTS D

[4] Without doubt, the three respective clauses in the three respective agreements between the parties, are by themselves 'arbitration agreements' within the meaning of s 9 of the Arbitration Act 2005. Section 9 of the Act reads as follows: E

9 Definition and form of arbitration agreement

- (1) Agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. F
- (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing. G
- (4) An arbitration agreement is in writing where it is contained in —
- (a) a document signed by the parties;
 - (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or H
 - (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. I
- (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

- A [5] Learned counsel for the plaintiff submitted that where issues of fraud are pleaded, the repealed provision of the old s 25(2) of the Arbitration Act 1952 is still applicable and he relied on the case of *Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)* [2008] 8 MLJ 471; [2008] 1 LNS 401.
- B [6] The above cited case, can be distinguished with the case today, as in that case, the learned trial judge made a finding and held that the Arbitration Act 1952 was the applicable law. On the other hand, as explained above, the applicable law in today's case is the current Arbitration Act 2005.
- C [7] That being so, the court must also look at the other relevant provisions of the Arbitration Act 2005.
- D [8] Section 23 provides for the definition of commencement of arbitral proceedings. The section reads as follows:
- Commencement of arbitral proceedings
- E 23 Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.
- F [9] Section 51(2) provides for the time frame during the transitional period of the repealed Arbitration Act 1952 and the date of coming into operation the Arbitration Act 2005. Section 51(2) reads as follows:
- Repeal and savings
- G 51(2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.
- H [10] Section 18 provides for the competency of the arbitral tribunal to rule on the validity of arbitration agreements. Section 18 reads as follows:
- 18 Competence of arbitral tribunal to rule on its jurisdiction
- I (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
- (2) For the purposes of subsection (1) —

- (a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and **A**
- (b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause. **B**
- (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence
- (4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator. **C**
- (5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. **D**
- (6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.
- (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits. **E**
- (8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter. **F**
- (9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
- (10) No appeal shall lie against the decision of the High Court under subsection (8). **G**

[11] This application for stay of proceeding is obviously made under the provisions of s 10 of the Arbitration Act 2005. Section 10 reads as follows:

10 Arbitration agreement and substantive claim before court **H**

- (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds — **I**
 - (a) that the agreement is null and void, inoperative or incapable of being performed; or

- A (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
- (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
- B (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.
- C [12] Section 10 above must also be read with all the other relevant provisions of the Act, namely s 18, which touches on the competency of the arbitrator itself to decide on the validity of any arbitration agreement. It is of interest to note that sub-s 18(8) allows the aggrieved party to appeal to the High Court against the ruling on a preliminary question, such as on validity of the arbitration agreement. It is also of further interest to note that the decision by the High Court is final in nature. This is part of the jurisprudence which formed the basis of the Legislature's desire to reform the law relating to arbitration, which gave birth to the Arbitration Act 2005.
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- E [13] Upon reading the provisions of s 10, it is without doubt that the court should rise to the occasion to enforce the intended reforms to the arbitration laws in this country, be it for domestic or international arbitration. As so worded in the provision, the court should be in favour of granting a stay. Not to grant a stay would be the exception and not the norm. The word 'shall' in the section is imperative in nature. The imperative nature is further amplified with the wordings in s 10(3) of the Act.
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- [14] The wordings in s 10(3) reads as follows:
- G (3) Where the proceedings referred to in subsection (1) have been brought, the arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.
- H
- [15] In other words the arbitral proceedings takes precedent over any court proceeding: Priority is to be given to arbitral proceedings!
- I [16] On this matter too, I am also guided by a host of recent decisions, such as:
- (a) By the Court of Appeal in *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817.
- (b) *Innotec Asia Pacific Sdn Bhd v Inotec GmbH* [2007] 8 CLJ 304.

- (c) *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233. **A**
- (d) *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872.
- (e) *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561. **B**

[17] In conclusion, based on the above, and applying s 10(1) that is read together with s 18 of the Arbitration Act 2005, the application for stay of proceedings by the first defendant as prayed in encl 9, is hereby allowed, with costs. **C**

Application allowed with costs.

Reported by Kohila Nesan **D**

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